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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-126

BERTRAM L. PODELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-128

MARTIN MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Podell Pet. App.; Miller Pet. App.) is reported at 519 F.2d 1440.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1975. The petitions for a writ of certiorari were filed on July 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners should have been permitted to withdraw their guilty pleas on the basis of their assertions that the government breached certain provisions of its plea agreements with them.

2. Whether the trial court failed to satisfy the requirements of Rule 11 of the Federal Rules of Criminal Procedure in accepting petitioner Miller's guilty plea.

STATEMENT

Petitioners were charged in an indictment returned in the United States District Court for the Southern District of New York with conspiracy to defraud the United States and to solicit or receive bribes and improper compensation (Count I) and conspiracy to defraud the United States, to obstruct justice, and to give false statements (Count VII), in violation of 18 U.S.C. 201, 203, 371, 1001, 1503, 1510 and 1623. In addition, petitioner Podell was charged with hav-

ing received and solicited bribes (Counts II and III) and improper compensation (Count V) and having made false statements (Counts IX and X), in violation of 18 U.S.C. 2, 201(c), 203(a), 1001 and 1623. Petitioner Miller was also charged with having offered a bribe and improper compensation (Counts IV and VI), in violation of 18 U.S.C. 201(b) and 203(b).[1]

At petitioners' trial, the government introduced evidence tending to show that while Podell was a member of Congress he received approximately $41,000 in legal fees and campaign contributions from Miller in return for appearing before several federal agencies on behalf of Florida Atlantic Airlines. Evidence was also introduced establishing that Podell had made false statements to agents of the F.B.I. concerning his relationship with Miller and Florida Atlantic Airlines and that he had lied under oath to the grand jury (Miller Pet. App. 3).

On the tenth day of trial, after the government had completed its case-in-chief and during a recess in Podell's cross-examination, Podell offered to plead guilty to that portion of Count I of the indictment charging him with having conspired to defraud the United States and to receive improper compensation and to Count V, which charged him with having received improper compensation (Tr. 1428). In re-

[1] Count VIII of the indictment charged petitioner Podell's brother, Herbert S. Podell, with having made false statements, in violation of 18 U.S.C. 1001. Herbert Podell's case was severed from petitioners' prior to trial (Miller Pet. App. 3, n.2).

sponse to questions put to him by the court, Podell —an attorney and congressman—stated that he was pleading guilty voluntarily, that his plea was not the result of coercion by the government or promises made to him by his own counsel and that he had fully discussed his plea with counsel (Tr. 1429-1430). The court advised Podell that by pleading guilty he waived his right to trial on the charges against him (Tr. 1429-1433). Podell explained the factual basis of his plea as follows (Tr. 1430-1431):

> If the Court pleases, while a member of Congress and acting as a lawyer for Florida Atlantic Airlines and paid by Leasing Consultants, Inc., I appeared before various federal agencies, including the CAB, the FAA, and advocated the interests of the said Florida Atlantic Airlines.
>
> I was indirectly compensated through my law firm for these appearances before the CAB and the FAA while a member of Congress.
>
> I did not at the time know that I was violating any law, but I intended to do what I did.

The court then accepted Podell's plea, after having ascertained that he was aware of the maximum sentence that could be imposed as a result of the plea (Tr. 1431-1433).

After the court had accepted Podell's plea, petitioner Miller also offered to plead guilty to that portion of Count I charging him with having conspired to defraud the United States and to receive or solicit improper compensation (Tr. 1433-1434). Miller also assured the court that he was pleading guilty of his

own free will, without any pressures or threats from the government or promises from his attorney. He also stated that he understood that by pleading guilty he waived his right to trial on the charges against him and that he was aware of the maximum penalty that could be imposed as a result of the plea (Tr. 1434-1435). Miller then outlined the factual basis of his plea as follows (Tr. 1435-1436):

> Your Honor, Congressman Podell was introduced to me as a congressman-attorney by Melvin Heiko. I, on behalf of Leasing Consultants, Inc. retained him for his influence. At the time I had no knowledge that I violated any of the laws of the United States. I understand now that I did.

The court also accepted Miller's plea (Tr. 1436). The remaining counts against petitioners were dismissed.

A week before petitioners were to be sentenced, Assistant United States Attorney Michael Mukasey informed the sentencing court by letter that, pursuant to the policy of the United States Attorney's Office and an agreement with the Chief Judge of the Southern District of New York, the government would not recommend any specific sentences for petitioners. However, Mukasey asked the court to consider a number of factors when imposing sentence: the seriousness of the crimes to which petitioners had pleaded guilty, the need for deterrence, the importance of equal administration of the law, and petitioner Podell's persistent lying under oath. Mukasey concluded the letter by suggesting that in imposing sen-

tence on petitioner Miller, the court should consider his truthful testimony before a federal grand jury concerning his illegal payments to petitioner Podell. The letter did not explicitly recommend imprisonment or any other specific sentence.[2]

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[2] The text of the letter was as follows (Miller Pet. App. 5-6 n. 3):

> Your Honor presided over the trial of this case and is certainly aware of the serious nature of the crimes committed by both these defendants. At the time of sentence the Government will set forth in more detail its arguments concerning the seriousness of these offenses. As Your Honor knows, pursuant to the policy of this office and our agreement with Judge Frankel, we do not recommend specific sentences unless requested by the Court in advance. However, there are several matters which we would like the Court to consider prior to the sentencing proceeding.
>
> Bertram L. Podell held a high position of public trust. By his plea of guilty to two Federal felonies, he admitted that he violated that trust by using the influence of his public office to earn large sums of money for himself as a partner in the firm of Podell and Podell and as the sole beneficiary of the sums expended by the Citizens Committee for the Re-Election of Bertram L. Podell. Podell pleaded guilty to conspiracy to defraud the United States and a substantive violation of conflict of interest statutes. Both of these are serious violations of Federal Law and should be treated seriously at the time of sentence. Similarly, Martin Miller was a knowing and willing buyer of Podell's influence to benefit his airline.
>
> Obviously, sentences serve many purposes but in cases such as these the prime purposes are deterrence and the equal administration of the law.
>
> The crimes involved in this case are "victimless" only in the sense that there can be no complaining witness to bring them to the attention of the authorities. When both parties to a corrupt bargain, such as Podell and

On January 9, 1975, petitioners moved to withdraw their guilty pleas, asserting that the government's letter violated certain provisions of its plea bargains with them. After an evidentiary hearing, the district court denied the motions. The court sentenced petitioner Podell to two years' imprisonment, all but six months of which was suspended, and fined him $5,000. Petitioner Miller was sentenced to two years' impri-

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Miller, are satisfied, the public interest can often be compromised without detection. It is therefore particularly important that others who may be tempted to enter into such corrupt bargains be deterred.

Moreover, the criminal justice system has often been criticized for treating less seriously the crimes of the privileged and powerful than those of the less advantaged. The crimes in this case, involving the betrayal of public trust, are serious ones. We believe the Court's sentence should reflect that seriousness.

Further, as Podell's plea showed, many of his statements to the FBI, to a grand jury in this District, and ultimately from the witness stand, were false. This history of lying under oath is one the Court is fully entitled to consider in imposing punishment.

Obviously, Podell's political career does include substantial public service, much of which is no doubt being brought to the Court's attention. Such service is the very content of a political career. However, the power that Podell had to do good as a Congressman makes all the more serious his abuse of that power.

Finally, the Court should also be aware that although Martin Miller elected after being indicted to stand trial, he did provide valuable information to the Government during the investigation that preceded the indictment. Miller testified before a grand jury in this District to the payments he made to Podell in return for Podell's use of Congressional influence in his behalf. That substantial cooperation should be weighed by the Court in Miller's favor in sentencing him.

sonment, all but six months of which was suspended, and fined $10,000 (Hr. 141).[3] The court of appeals affirmed (Podell Pet. App.; Miller Pet. App.).

ARGUMENT

1. Petitioners contend (Podell Pet. 3; Miller Pet. 6-7) that the letter sent to the court by AUSA Mukasey violated the promise that had been made to them that the government would not recommend their imprisonment if they pleaded guilty. Petitioner Podell separately contends (Pet. 4) that the letter violated AUSA Rudolph Giuliani's promise that he would appear before a bar association disciplinary proceeding and testify that Podell's conviction did not involve bribery and did not reflect a "corrupt and criminal intent." Petitioner Miller also claims (Pet. 8) that the letter violated a government promise to "go to bat" for him at sentencing.

At the hearing on petitioners' motions to withdraw their guilty pleas, AUSA Giuliani acknowledged that he had promised to testify at a bar association disciplinary proceeding that petitioner Podell had not pleaded guilty to conspiracy to commit bribery (Hr. 39-49). Giuliani also acknowledged informing defense counsel of the general policy followed by the United States Attorney's Office in the Southern District of New York of not recommending any specific sentence

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[3] "Hr." refers to the transcript of the hearing held in connection with petitioners' motions to withdraw their guilty pleas.

unless requested to do so by the court. But Giuliani and AUSA Joseph Jaffe, who had participated with Giuliani in the plea negotiations involving petitioners, also stated that they had informed defense counsel that at sentencing the government would make a statement concerning the facts of the cases against petitioners and the seriousness of the crimes to which petitioners had pleaded guilty, and that the government's position at sentencing was not a subject for negotiation (Hr. 37-39, 47, 49-50, 91, 93-94, 97, 108-110). Indeed, petitioner Podell's trial counsel admitted that during plea negotiations AUSA Giuliani had rejected "out of hand" his suggestion that the government not oppose a suspended sentence for Podell and that Giuliani reserved the right "to submit the facts to the Judge" at the time of sentence (Hr. 57).

The district court found that the plea agreement between the government and petitioners included a promise that the government would not recommend petitioners' imprisonment and that AUSA Mukasey's letter violated "the spirit, if not the letter of the agreement" (Hr. 116). The district court also found, however, that neither Podell nor Miller had relied to any significant extent on the government's representations concerning sentencing when they decided to plead guilty (Hr. 116-117). The court found that Podell's decision to plead guilty stemmed from a desire on his part to avoid a bribery conviction, which would have resulted in his automatic disbarment (Hr. 116-117). Miller's decision to plead guilty was, ac-

cording to the court, an almost inescapable consequence of Podell's guilty plea. Once Podell had pleaded guilty, he became available to testify against Miller, and Miller's statements to the grand jury, which incriminated both him and Podell, were no longer inadmissible under *Bruton* v. *United States*, 391 U.S. 123. As the district court stated, "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do" (Hr. 117).

Since petitioners' guilty pleas did not rest to any significant degree on any promises that may have been made to them on behalf of the government, the district court properly denied their motions to withdraw their pleas. See *Santobello* v. *New York*, 404 U.S. 257, 262; *United States* v. *Lombardozzi*, 467 F.2d 160, 163 (C.A. 2), certiorari denied, 409 U.S. 1108; *United States* v. *Lombardozzi*, 436 F.2d 878, 880-881 (C.A. 2), certiorari denied, 402 U.S. 908.[4]

2. Petitioner Miller also contends (Pet. 8-10) that the district court accepted his guilty plea without satisfying the requirements of Rule 11 of the Federal Rules of Criminal Procedure. More specifically, Miller contends that the court failed to establish on the record, as required by Rule 11, that Miller

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[4] Since the court of appeals agreed with the district court that petitioners had not pleaded guilty because of any representations made on behalf of the government, it did not reach the issue of whether the government breached its plea agreements with them (Miller Pet. App. 8-9, n. 5). We believe that the district court erred in finding that the letter sent to the court by AUSA Mukasey violated "the spirit, if not the letter" of the agreements, but agree that that issue need not be resolved on the facts of these cases.

understood the nature of the conspiracy charge to which he was pleading guilty. This contention is also without merit.

Although the court did not explain the conspiracy charge to which Miller offered to plead guilty immediately preceding acceptance of his plea, such an explanation was not required given the events that had preceded Miller's decision to change his plea. Before Miller stated that he wished to plead guilty, he had heard the court explain the elements of the conspiracy charge to the jury (Tr. 6-7). Thereafter, he had heard the government, in its opening statement, inform the jury that the conspiracy charge encompassed petitioner Podell's efforts to use his influence on behalf of Florida Atlantic Airlines in return for payments by Miller (Tr. 12-13, 17-18, 30). Miller had also listened to evidence introduced during the government's case-in-chief that tended to establish that while Podell was a congressman, Miller had paid Podell approximately $41,000 in legal fees and campaign contributions in order to influence proceedings before several federal agencies involving Florida Atlantic Airlines. As the court of appeals held (Miller Pet. App. 10), "Under these circumstances, it is frivolous to argue that the pleas should be set aside because the judge failed to outline in detail the necessary elements of the charge, all of which were amply established in the trial record."[5]

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[5] Petitioner Miller asserts (Pet. 9) that his lack of understanding of the conspiracy charge to which he pleaded guilty is shown by his statement upon tendering his guilty plea

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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that when he committed the acts in question he was not aware that he was acting illegally. As the court of appeals pointed out (Miller Pet. App. 10, n. 7), however, knowledge of illegality was not an element of the conspiracy charged in the indictment. See *United States* v. *Feola*, 420 U.S. 671; *United States* v. *Quinn*, 141 F. Supp. 622 (S.D. N.Y.).

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